Filed 8/24/15 Doug Ross, Inc. v. Reid CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

DOUG ROSS, INC.,

Plaintiff and Respondent,

v.

AL JAMES REID, AS TRUSTEE, etc.,

Defendant and Appellant.

F068668

(Super. Ct. No. VCU247567)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Paul A. Vortmann, Judge.

Law Office of Douglas S. Long and Douglas S. Long for Defendant and Appellant.

Harold L. Rollin for Plaintiff and Respondent.

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This case involves a five-year renewable mining lease by which the tenant, Doug Ross, Inc., doing business as Central Valley Asphalt (CVA or plaintiff), operated a granite mine. The property was owned by Al James Reid (defendant), who received royalties from the mining operation. In early 2010, shortly before the end of the five-year term of the lease, the parties exchanged opposing notifications: (1) defendant sent a letter to plaintiff stating the tenancy was being terminated and (2) plaintiff sent a letter to defendant purporting to renew the lease for an additional five years. In 2011, defendant sold the land to a third party. Plaintiff then sued defendant for breach of lease and related causes of action, and the case was tried as a bench trial. The trial court determined that plaintiff had properly renewed the lease for an additional five-year term and, consequently, the trial court awarded monetary damages to plaintiff as compensation for defendant's breach of, or interference with, plaintiff's lease rights. Defendant appeals from the judgment, arguing the trial court erred in finding that plaintiff was not in default at the time he sought to renew the lease. Plaintiff counters that the trial court's factual findings were adequately supported by substantial evidence.

We agree with plaintiff and affirm the judgment below for two reasons. The first reason is that defendant has violated the rules governing brief preparation, in that his opening and reply briefs make numerous factual assertions without citing to the record. Defendant also fails to summarize all relevant evidence, both favorable and unfavorable, to his position. These failures forfeit defendant's right to raise error based on insufficiency of the evidence. The second reason is that our independent review of the record confirms that there is substantial evidence to support the trial court's findings and decision.

FACTS AND PROCEDURAL HISTORY

Defendant and his father, William T. Reid, purchased a 20-acre parcel of land in Tulare County, in or near the city of Strathmore, for use as a gravel pit for surface mining of decomposed granite. The land had been used for mining by a previous owner, but the

permit had lapsed. In late 2001, defendant and his father hired a civil engineer, James Winton, to prepare an application for a new surface mining permit. On the application, a box was checked estimating the proposed mining operation as "5,000–50,000 cu. yds/yr." The application also disclosed that mining would be "CONTINUOUS[,] BUT DEPENDENT UPON DEMAND." According to defendant's opening brief, a permit was granted to defendant and his father by Tulare County in approximately 2004.

On March 9, 2006, defendant and his father, as lessors, entered into a one-page agreement with plaintiff, as tenant, entitled, "COMMERCIAL LEASE" (the lease). The lease had a stated commencement date of March 1, 2005, with the five-year term terminating on February 28, 2010.[1] The lease provided that the lessors were entitled to receive a royalty of $0.50 per ton of Granite and Screened Granite that is exported from the site on the first year, and $0.60 per ton of granite and screened granite that is exported from the site for the remaining four years. If prices for granite and screened granite exceeded $2.50 per ton and $3.50 per ton, respectively, the rate payable to lessors would increase by 30 percent per ton. The leased stated: "The proposed maximum annual production of the surface mine will range between 5,000–50,000 cubic yards, with a maximum production of 750,000 cubic yards (marketed) over the life of the project." Thus, while a maximum production amount was stated, no minimum was stated. Plaintiff testified that the lease had a maximum, but not a minimum production requirement, for various reasons including the parties' initial business strategy of filling the spot market when other suppliers ran low and also the need to stay within permit conditions that had affected the road assessments.

The lease had an option to renew. The renewal provision stated: "OPTION TO RENEW. Provided that [plaintiff] is not in default in the performance of this lease and

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[1] Although the lease commenced on March 1, 2005, which could indicate plaintiff began operations pursuant to an oral agreement, plaintiff testified he did not recall taking possession of the property or commencing mining until the lease was actually signed in March 2006.

mining production is still viable, [plaintiff] will have the option to renew lease with the current terms."

After defendant's father died, defendant appointed Job Denni of Landmark Realty to serve as his agent in overseeing the ownership of the mine property. As defendant's agent, Denni informed plaintiff he wanted to negotiate an addendum to the lease. The proposed addendum would modify the lease by (1) having plaintiff pay property taxes, (2) providing for upward adjustments to the amount of royalty payments, and (3) creating a *minimum* amount of materials (i.e., 5,000 cubic yards) per year that plaintiff would be required to extract from the mine. Denni prepared a written draft of a proposed addendum for plaintiff to consider. In response, plaintiff informed Denni that he would *not* agree to the proposed minimum production amount because such a term was not part of the original lease and because the mine had never pulled as much as 5,000 cubic yards annually. After plaintiff expressly rejected the proposed minimum production level, that provision was removed or drafted out of the proposed written addendum. The final "ADDENDUM TO COMMERCIAL LEASE" (the addendum), which was agreed to and signed by the parties on March 27, 2008 and April 1, 2008, did not contain a minimum production amount.

The new terms set forth in the addendum included that plaintiff was to pay all real property taxes and trade fixture assessments levied by governments against the mine and the real property, and that the royalty amounts payable to defendant were subject to upward adjustments under the consumer price index.

Ross testified that after CVA took possession of the mine, it mined as much gravel as customers would purchase. This was consistent with the surface mining permit application, which stated that mining would be "CONTINUOUS[,] BUT DEPENDENT UPON DEMAND." This worked out to an average of 5,000–6,000 tons per year.

Ross testified that no more than one or two consecutive months passed where CVA did not remove some gravel from the mine. Denni and defendant both admitted

that CVA sent monthly statements detailing the mining activity to Denni, even for those months when there was no mining activity.

Neither defendant's father, defendant nor Denni ever complained that CVA had failed to meet a minimum. During the months CVA did not remove any material from the mine, CVA never received notice stating that CVA was in default. Ross and Denni both testified that CVA never received a notice of default of any kind with regard to any issue and that no attempt was made to terminate the lease during the initial five-year term.

Ross testified that in approximately November 2009, defendant told him that defendant needed money to pay $1.3 million in property taxes owing on property his father had owned. In response, from approximately December 2009 or January 2010 through May 2010, CVA extracted 5,000–7,000 tons from the mine and hauled it to CVA's yard where CVA stockpiled and sold it. After May 2010, the mine remained idle because CVA had filled its yard with materials that lasted until approximately July 2012. Denni sent a letter to CVA on January 1, 2010, giving notice of termination effective February 28, 2010. CVA did not receive the notice until January 27, 2010. On January 29, 2010, Ross sent a letter to Denni notifying him of CVA's intention to renew the lease for an additional five years. There was no response to CVA's letter of intent to renew the lease. CVA continued mining the mine and continued sending royalty payments to Denni, which Denni and defendant accepted. Denni and defendant continued accepting payments for mining performed for several months after the initial five-year term had expired. CVA last removed material from the mine in May 2010. The June 2010 payment was the last royalty payment.

After May 2010, when CVA was no longer removing granite from the mine, it continued sending monthly reports to Denni indicating no removal. CVA continued cutting firebreaks twice each year, and submitted to and paid for county inspections. Each year, CVA posted an approximate $12,000 financial assurance bond with the

county. CVA filed a 2010 Mining Operation Annual Report with the county. CVA's accountant prepared a letter dated June 30, 2010, to the California Department of Conservation, which was sent with a check. CVA filed other reports and paid associated fees as well.

The addendum first imposed the obligation on CVA to pay taxes associated with the mine. Although Denni and defendant received the tax bills and paid them, they never sent these tax bills to CVA and never requested that CVA reimburse the taxes defendant had paid with regard to the mine. When Ross discovered during mediation of this dispute that the real property taxes had not been paid, CVA tendered those taxes to defendant by a check dated May 11, 2012. CVA paid all personal property taxes it owed. CVA timely paid road taxes and fees to the county.

Defendant testified CVA stole granite using double trailers. CVA has never owned double trailers.

In November 2011, defendant sold the gravel pit to Bob Vollmer, doing business as Frazier Valley.

Frazier Valley filed an unlawful detainer complaint naming CVA as the defendant. Thereafter, CVA filed a complaint against Denni, Frazier Valley and defendant for quiet title, declaratory relief, breach of contract and intentional interference with prospective advantage. The actions were consolidated. Cross-complaints were filed. A court trial commenced. During the trial, a settlement was reached that removed Frazier Valley from the lawsuit. After the trial concluded, the matter was submitted and the court rendered a decision in favor of CVA and against defendant, and awarded plaintiff $49,299 for defendant's breach of contract and interference with economic advantage. The court found against defendant on his cross-complaint against plaintiff.

DISCUSSION

I. Standard of Review

Although defendant does not explicitly address standard of review, it is clear that his intentions on appeal invoke the substantial evidence standard. That standard provides that resolution of disputed factual issues must be affirmed on appeal so long as they are supported by substantial evidence. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053.) We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference in resolving all conflicts in its favor. (*Ibid*.) And, it is established law that a reviewing court presumes that the record contains evidence to sustain every finding of fact. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881 (*Foreman*).)

II. Defendant's Failure to Submit Brief in Accordance with Appellate Rules Forfeits Argument That Trial Court's Findings Were Not Supported by Substantial Evidence

The California Rules of Court and case law obligate an appellant who is challenging the sufficiency of the evidence to support the trial court's findings of fact to support any reference to a matter on the record by a citation to the volume and page number of the record where the matter appears, and to summarize all pertinent evidence favorable and unfavorable. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Foreman, supra,* 3 Cal.3d at p. 881; *Haynes v. Gwynn* (1967) 248 Cal.App.2d 149, 150–151 (*Haynes*).) Failure to so comply is deemed to be a waiver. (*Foreman*, *supra*, at p. 881; *Haynes*, *supra,* at pp. 150–151.)[2]

The reasons for these rules are sound. Since a reviewing court presumes that the record contains evidence to support every finding of fact, it is incumbent upon the

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[2] Opinions often use the term "waiver," when the correct term is "forfeiture." The correct legal term for the loss of a right based on a failure to timely assert it is "forfeiture." A "waiver" is the intentional relinquishment or abandonment of a known right. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2.)

appellant to state fully, with transcript references, the evidence that is claimed to be insufficient to support the findings. A reviewing court is not called upon to make an independent search of the record where this rule is ignored. (*Haynes, supra*, 248 Cal.App.2d at p. 151.) As explained by the *Haynes* court:

> "If and when we are required to perform tasks which are properly those of [the] appellants' counsel, we necessarily relegate farther into the background appeals waiting their turn to be decided. It is unfair to litigants thus affected that we do this." (*Haynes, supra*, 248 Cal.App.2d at p. 151.)

Defendant's opening brief contains 10 pages of a "STATEMENT OF FACTS." Some of the facts asserted have a citation to the lower court record. Many do not. Thus, defendant has violated California Rules of Court, rule 8.204 and has also violated long-standing case law that requires one challenging the sufficiency of the evidence to support lower court findings to support all evidentiary references with a citation to the volume and page number of the record where the evidence appears.

Defendant has also failed to adequately summarize all pertinent evidence in this case, both favorable and unfavorable. In several instances, he has failed to include in his factual summary evidence presented by plaintiff that the trial court obviously relied on. Instead, in several instances, defendant has only presented evidence favorable to him without disclosing that contrary evidence was also received in the trial. This also constitutes a forfeiture of defendant's right to claim that findings by the trial court were not supported by substantial evidence. (*Foreman, supra*, 3 Cal.3d at p. 881; *Haynes, supra*, 248 Cal.App.2d at p. 151.) In light of defendant's disregard of his obligations on appeal, we deem him to have forfeited all claims of error based on insufficiency of the evidence. Inasmuch as defendant's claims of error are based entirely on the state of the evidence, we find that his failure to submit a brief that complies with the rules forfeits his argument on appeal from being considered by this court.

III. Our Independent Review of the Record Supports the Trial Court's Findings

We have independently reviewed the trial court's record and find that there is substantial evidence to support all of the factual findings the trial court made in rendering its decision. In light of defendant's forfeiture of his argument on appeal that the evidence was insufficient, we deem it unnecessary and indeed wasteful of judicial resources to specify all of the pieces of evidence that support the trial court's findings.

DISPOSITION

The judgment is affirmed. Costs are awarded to plaintiff.

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KANE, J.

WE CONCUR:

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HILL, P.J.

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SMITH, J.